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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| FRED S. PARDES,<br>Plaintiff and Appellant,<br>v.<br>SUSAN DOAN,<br>Defendant and Appellant. | G056170<br>(Super. Ct. No. 30-2010-00391251)<br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Melissa R. McCormick, Judge. Reversed with directions.

Coleman & Horowitt, Gregory J. Norys, Gary S. Shuster and Brandon A. Hamparzoomian for Defendant and Appellant.

Law Offices of Fred S. Pardes and Fred S. Pardes for Plaintiff and Appellant.

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## I. INTRODUCTION

Lawyer Fred Pardes first sued his former client Susan Doan in 2009 for unpaid fees. He knew a lot about Doan's assets: Pardes knew Doan controlled an 8-unit apartment complex in Long Beach known as the "Rose property" through a revocable trust of which she was the sole trustee and beneficiary. But Pardes' case was dismissed without prejudice by the superior court because he did not give Doan notice of her right to arbitrate their fee dispute. Then, in 2010, Doan filed for bankruptcy. She did not list her interest in the Rose property as one of her assets. *During* the bankruptcy, Pardes filed a second suit for fees against Doan, the lawsuit before us now.

Pardes knew during the bankruptcy that Doan had failed to list her interest in the Rose property as one of her assets. But he didn't tell the bankruptcy trustee about it. Had he done so the asset would have been available to all her creditors, not just Pardes. Instead, Pardes waited until after Doan obtained a discharge in bankruptcy. Then he obtained a default and default judgment against Doan based on the 2010 state court action he had filed during her bankruptcy. The trial court granted Doan's motion to set aside the default and default judgment, but did not declare the 2010 complaint void. That meant that Pardes could pursue Doan once again in state court for his fees via the 2010 complaint, though Doan would now have the chance to fight the case on the merits.

Both sides have appealed. As we explain below, because of the automatic stay that takes effect the moment a bankruptcy petition is filed (11 U.S.C. § 362), Pardes' filing of a state court complaint to collect his fees during Doan's bankruptcy was void *ab initio*. That means the trial court never acquired subject matter jurisdiction over Pardes' fee claim against Doan. Technically, the trial court could not even relieve the default or the default judgment because it was without jurisdiction to do so; its only choice was to announce it had no jurisdiction and dismiss the complaint. And that is what we now direct it to do on remand.

## II. BACKGROUND

In March 2009, Pardes filed a complaint in Orange County Superior Court (the 0068 case) against Doan for allegedly unpaid fees. In the 0068 complaint Pardes alleged, inter alia, that Doan was the equitable owner of the Rose property in Long Beach via her control of First Coastal Trust, a revocable trust that was the legal owner. The Rose property is an 8-unit apartment complex in Long Beach.

The 0068 case was dismissed without prejudice in January 2010 because Pardes had not given Doan notice of her right to arbitrate a fee dispute with a lawyer. So later that same month, Doan requested state bar arbitration of the fee dispute. She asserted she had fired Pardes for conflict of interest, unfair practices, and the fact he was billing her for about $66,000 when she really owed only $10,000 at most.[1]

Then, on April 16, 2010, Doan filed for bankruptcy. She listed Pardes among her creditors. Those creditors included Wells Fargo Home Mortgage and Capital One. But she did not list the Rose property as among her assets.

On July 20, 2010 – while Doan's bankruptcy was pending – Pardes filed this action in state court (the 1251 case) seeking fees allegedly due. He listed four named defendants in his caption: Doan as an individual; the Susan A. Doan Trust; the First Coastal Trust; and the Silverado Land Trust. He did not, however, include as a defendant Susan Doan *as trustee* of First Coastal Trust.

Pardes has asserted that an address mix-up at the Dana Point post office prevented his receiving notice of Doan's bankruptcy prior to his July 20, 2010 filing of the 1251 case. But he certainly was aware of it by August 23, 2010, when he wrote a letter to Doan's bankruptcy attorney complaining that the notice of bankruptcy had been sent to the wrong address. That letter indicated he intended to keep the 1251 case alive and on file despite the pendency of bankruptcy proceedings: "Still waiting legal

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[1] Our record does not contain any information illuminating these allegations.

authority from your firm confirming that I have to file a dismissal at the this stage of the proceedings." But Pardes did not dismiss the 1251 case. Rather, in September 2010, he sent a notice of stay to the four defendants in the 1251 state court case.[2]

Doan obtained a discharge order in her bankruptcy on January 8, 2011. The notice of discharge listed at least 16 parties who appear to have been Doan's creditors, including both the Pardes Law Offices and Pardes' professional corporation.

Pardes never brought the omission of the Rose property to the attention of the bankruptcy trustee. But about six months after the discharge, in June 2011, he filed in the 1251 action a notice declaring that since First Coastal Trust had not been listed among Doan's assets in the bankruptcy, "Plaintiff may proceed against this entity." His intent was apparently to levy on the Rose property, First Coastal's only asset.

Pardes then sought to obtain Doan's default.[3] And by November 2011, he had obtained both a default and default judgment. That judgment provided for a base recovery of $63,702.28, which was bumped up to $98,179.46 with added interest.

Nothing happened for about five years. Then, in 2017, Pardes tried to levy on the Rose property. However, as his declaration for an amended judgment that year shows, he could not levy on the property because he had not named Doan "as trustee" of First Coastal Trust. So he obtained an amended default judgment which now included "Susan Doan as Trustee of First Coastal Trust" as a separate defendant.

Doan, who was seeking to refinance the Rose property, soon discovered that Pardes had made a claim for payoff. On October 19, 2017, she filed a motion in the 1251 case to set aside the default and default judgment.

Pardes countered by characterizing Doan's failure to include the Rose property as a fraud on the bankruptcy court. He emphasized that point by including, as

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[2] Since Doan was trustee of the three named defendant trusts, she received the notices sent to all four defendants.

[3] His June 2011 notice declared he was "concurrently seeking a default at this time."

an exhibit in opposition to her set aside motion, his own letter of August 23, 2010, to Doan's bankruptcy attorney saying he saw no mention of the Rose property in Doan's bankruptcy filings. Doan responded by noting that while Pardes knew of the omission, he failed to raise the issue while the bankruptcy case was still ongoing.

When the motion was heard in late March 2018, Pardes again stressed Doan's omission of an asset in her bankruptcy asset schedules. However, relying on two Ninth Circuit cases, *In re Schwartz* (9th Cir. 1992) 954 F.2d 569, 570 (*Schwartz*) and *Eskanos & Adler P.C. v. Leetien* (9th Cir. 2002) 309 F.3d 1210, 1214 (*Eskanos*), the trial court ruled that the 1251 complaint was filed in violation of the automatic stay provisions of bankruptcy law, and therefore the default and default judgment based on that complaint were void.

But the court declined to declare the 2010 complaint itself void, so as to require it to be dismissed. If the trial judge's remarks at oral argument are any indication, the reason she declined to do so was because no published California state case has yet to hold that a state court complaint filed during bankruptcy is void *ab initio*.[4] Each side then timely appealed from the part of the order aggrieving them. Since Doan filed first, she is the appellant. Pardes is the cross-appellant.

## III. DISCUSSION

At oral argument in this court, Pardes strenuously distinguished between the "commencement" of a state civil suit against a debtor during the debtor's bankruptcy, and the "maintenance" of such a state civil suit. According to Pardes, the automatic stay imposed by the bankruptcy law only nullifies the "maintenance" of a suit; since he

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[4] "I reflected on the issue myself. There's case authority included in the tentative for the proposition that any action is avoid. What concerned me – and I wrote this in the tentative, as well. I have not been able to identify any published cases – you're welcome to disagree with me if I'm wrong – where a superior court has avoided [*sic*] a complaint under circumstances like this." A few moments later she said, "But in terms of voiding the complaint itself by a superior court judge, I didn't see any authority for that."

passively did nothing to "maintain" the 1251 action during Doan's bankruptcy, he now asserts he was free to pursue that action *after* the closure of the bankruptcy case.

This argument is without merit. "Judicial proceedings in violation of the stay are void *ab initio*." (*In re Gruntz* (9th Cir. 2000) 202 F.3d 1074, 1082, fn. 6.) The automatic stay rule applies to even the commencement of state court proceedings as well as their maintenance. (*Estate of Horner v. Bailor* (N.D. Cal. 2019) [2019 U.S. Dist. LEXIS 47371 at p. 12] ["Civil actions commenced in a non-bankruptcy court in violation of the automatic stay are void *ab initio* and not merely voidable."].) Such actions are never valid and can have no effect. For example, a deed that is declared void *ab initio* passes no title at all at the time the deed is made. (*In re Marriage of Jovel* (1996) 49 Cal.App.4th 575, 584-585.)

The Ninth Circuit case that most dramatically illustrates this point is *Schwartz, supra,* because it shows the rule applies as much to the Internal Revenue Service (IRS) as it might to a private litigant like Pardes, and it demonstrates that it makes no difference whether the creditor knows the debtor has filed for bankruptcy or not.

In *Schwartz,* taxpayers filed for bankruptcy in 1983. The IRS was not aware of the filing, and in 1984 assessed a $65,000 tax penalty against the taxpayers. In 1985 the taxpayers dismissed their bankruptcy. Then in 1987 the IRS filed a tax lien in King County seeking additional penalties. The Ninth Circuit held that even the IRS penalty assessment of 1984 was "without effect." (*Schwartz, supra,* 954 F.3d at p. 571.) Indeed, the court noted the "majority of courts have long stated that violations of the automatic stay are void *and of no effect*." (*Id.* at p. 572, italics added.) If an IRS administrative assessment without knowledge of the bankruptcy was of no effect (*Schwartz*), surely a state court complaint for attorney fees filed during a bankruptcy can have no effect.

The other case cited by the trial court, *Eskanos*, took the *Schwartz* ruling further by declaring that creditors have "an affirmative duty to discontinue post-petition collection actions" in state court. (*Eskanos, supra*, 309 F.3d at pp. 1214-1215.) Under *Eskanos*, Pardes should have dismissed this case back in August 2010 when he learned of Doan's bankruptcy.

To the degree Pardes does seem to acknowledge the rule that a complaint filed in state court during a bankruptcy is void *ab initio*, he argues that the rule does not apply because of Doan's unclean hands in omitting the Rose property from her list of assets. This argument is refuted by the fact the automatic stay takes effect the moment a bankruptcy petition is filed. (*In re Elmore* (C.D. Cal. 1988) 94 B.R. 670, 672.) Logically, then, violations of that stay cannot depend on the accuracy of a debtor's asset schedules, which may take some time to analyze. Pardes is thus unable to cite any authority to the effect that an unlisted asset in a bankruptcy schedule will in any way lessen the force of the automatic stay.

Moreover, Pardes' unclean hands argument is completely vitiated by his own unclean hands in not bringing Doan's hidden asset to the attention of the bankruptcy trustee back in 2010 when he had the chance. Even if, for sake of argument, Pardes had no legal obligation to tell the bankruptcy trustee about Doan's missed asset, his silence certainly forfeits the moral high ground he affects to take against Doan. Indeed, were we to articulate some special rule that would render a state court complaint filed during a debtor's bankruptcy *not* to be void *ab initio* if it could be later shown the debtor omitted assets, it would give creditors like Pardes – creditors who are aware of the omission – an unfair advantage over the debtor's other creditors. Such creditors would have a special incentive to keep mum during the pendency of the bankruptcy in order to pursue the omitted asset for themselves on the chance the bankruptcy trustee or bankruptcy court

failed to discover it. We don't think Congress had *that* in mind in enacting the automatic stay.[5]

It may be true that no published California opinion has yet to declare the obvious conclusion that flows from the rule that any action taken in violation of the automatic stay is void *ab initio*.[6] However, the Supreme Court of Kansas (*United Northwest Federal Credit Union v. Arens* (1983) 233 Kan. 514 (*Arens*)), and the intermediate appellate court of Illinois (*Cohen v. Salata* (1999) 303 Ill.App.3d 1060 (*Cohen*)) have both squarely so held. *Arens* and *Cohen*, in fact, involved patterns very similar to the one here:

In *Arens*, the creditor filed a state court petition for recovery of certain money the day after the bankruptcy was filed. Then, after the bankruptcy petition was dismissed, the creditor obtained a default judgment. The Kansas Supreme Court held that "there was no action on file" when the bankruptcy petition was dismissed, so the trial court had no *jurisdiction* to enter the default judgment. (*Arens, supra*, 233 Kan. at p. 516.)

Likewise, in *Cohen*, the debtor filed for bankruptcy about two weeks before the state court complaint. After a discharge order, the state court plaintiff resumed the

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[5] On the other hand, the fact remains Doan *did* omit an asset in her bankruptcy. We therefore deny her motion to sanction Pardes for bringing a frivolous appeal.

[6] Contrary to Doan's assertion at oral argument, this court's opinion in *Sindler v. Brennan* (2003) 105 Cal.App.4th 1350 (*Sindler*) does not stand for such a proposition. There, a state court action was filed prior to the defendant's bankruptcy, and, after the defendant filed for bankruptcy, the state trial court required the plaintiff to report to it on the status of the bankruptcy. (*Id.* at p. 1351.) Later, the plaintiff submitted a preprinted form to the state trial court asking that the monitoring be suspended. But the preprinted form also provided that unless the plaintiff filed a declaration prior to a certain date, the state court would dismiss the action on its own motion. (*Id*. at p. 1352.) The plaintiff thereafter obtained from the federal district court an order *allowing* her claim to be adjudicated in state court. (*Ibid*.) It was then the plaintiff learned her state court case had already been dismissed. She asked the state trial court to set aside the dismissal. The state trial court then denied that request. This court, however, reversed. We noted the preprinted form was "misleading" because the applicable state rules of court governing bankruptcy monitoring did not provide for the unilateral dismissal of the state court action by the state court. (*Id.* at pp. 1353-1354.)

*Sindler* is a monitoring case, and one in which the plaintiff eventually obtained permission from the federal court to pursue her state court claims in state court. It is not one, like the instant case, involving a state court action filed *during* a defendant's bankruptcy and where the creditor never obtained any kind of relief from stay from the bankruptcy court to pursue the debtor in state court.

case, serving the debtor. The appellate court held the trial court didn't have subject matter jurisdiction to do anything other than "to announce" the fact it didn't have jurisdiction "and dismiss the cause." (*Cohen, supra,* 303 Ill.App.3d at p. 1066.)

We see no reason to depart from the case law we have found on this point. The trial court here did not have subject matter jurisdiction even to set aside the default or default judgment. The *only* jurisdiction it had was to announce its lack of subject matter jurisdiction over Pardes' 2010 complaint, and dismiss that complaint. (See *Goodwine v. Superior Court* (1965) 63 Cal.2d 481, 484 [where there is a lack of subject matter jurisdiction "the court must dismiss on that ground on its own motion"].)

## IV. DISPOSITION

In light of the foregoing, we reverse all trial court orders in this action and direct the trial court to dismiss the complaint.

This disposition, however, raises an interesting question concerning costs on appeal. One might argue that if the trial court had no jurisdiction to do anything other than dismiss the case, then we likewise have no jurisdiction to do anything other than direct the same result, ergo we should not even award costs on appeal to Doan, though Doan is clearly the prevailing party in this appeal.

But we reject this line of analysis. "[C]ourts always, by necessity, at least have jurisdiction to determine jurisdiction." (*Department of Fair Employment & Housing v. Verizon Cal., Inc.* (2003) 108 Cal.App.4th 160, 168.) And we have statutory jurisdiction to ascertain whether the trial court, in what was a postjudgment order, had jurisdiction to allow the 2010 Pardes' complaint to survive. (Code Civ. Proc., § 904.1, subd. (a)(2).)

Concomitantly, having such jurisdiction to decide whether the trial court had jurisdiction to make the postjudgment order here, we also have authority to award costs on appeal. (Cal. Rules of Court, rule 8.278; see Code Civ. Proc., § 1034, subd. (b)

["The Judicial Council shall establish by rule allowable costs on appeal and the procedure for claiming those costs."].)

Accordingly, in addition to our disposition reversing all trial court orders and directing the trial court to dismiss this action, we also determine that Doan shall recover her costs on appeal.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.